IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 4523 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JEVABHAI LALJI BRANDA

Versus

TRUCK NO.G J 9 V 956

Appearance:

1. First Appeal No. 4523 of 2001

MR LM CHHABLANI for appellants

RULE SERVED for Respondents No. 1-2

MR SHALIN N MEHTA for Respondent No. 3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 07/02/2002

ORAL JUDGEMENT

1. In this appeal filed under Section 173 of the Motor Vehicles Act, 1988 ('the Act' for short), appellants/original claimants seek to challenge the order dated February 26, 1999 recorded below Ex.5 in Motor Accident Claim Petition No.1394 of 1997 by the learned Motor Accident Claims Tribunal (Aux), Sabarkantha at

Himatnagar by which application filed at Ex.5 by the claimants to recover compensation of Rs.50,000/- under No Fault Liability principles envisaged under Section 140 of the Act came to be allowed against respondent Nos.1 and 2, that is, driver and owner of the vehicle involved in the accident, whereas respondent No.3 Insurance Company is excluded from the liability of payment of compensation.

2. Appellants are the claimants before the Tribunal in the claim petition filed under section 166 of the Act to recover compensation of Rs.3,50,000/- together with interest and cost thereon on account of the accidental death of their son Babulal Jevabhai Baranda in a vehicular accident which had taken place on July 28, 1997 while he was going to Mumbai from Modasa in truck No. GJ 9 V 956 driven by its driver respondent No.1 with his sheep and goats for selling them at Mumbai. Respondent No.1 driver of the said truck drove the truck rashly and negligently and with full speed as a result of which near village Bambhora the accident has taken place. In the said accident deceased Babulal Jevabhai Baranda received fatal injuries and ultimately succumbed to the same during the treatment. Therefore, it is the case of the appellants that the said accident has taken place because of the rash and negligent act of driving on the part of its driver and respondent No.2 being the owner is liable under the principle of vicarious liability and the said truck was insured with respondent No.3, Oriental Insurance Company Limited and under the contract of indemnity it is liable to indemnify the owner - insured against the award that is to be passed against him and, therefore, it is claimed that all the respondents are jointly and severally liable to pay compensation of Rs.3,50,000/- together with interest and cost thereon.

3. In the said petition, the appellants have also filed application under Section 140 of the Act to recover interim compensation of Rs.50,000/- The Tribunal, considering the FIR, Panchnama of scene of accident, inquest Panchnama, RC Book of the truck, cover note of the insurance policy and post mortem note, came to the conclusion that the accident has taken place on account of the rash and negligent driving of the truck by its driver respondent No.1 and the said accident has claimed the life of deceased Babulal. It is also held by the Tribunal that respondent No.2 is the owner of the said truck and therefore he is also liable under the principle of vicarious liability and therefore both of them are jointly and severally liable to pay compensation of Rs.50,000/- with interest at the rate of 12% per annum

from the date of application till the date of payment. So far as the insurance company is concerned, it is held by the Tribunal that the deceased was travelling in a Goods Vehicle and in view of the terms and conditions contained in the policy liability of passengers is not covered and therefore insurance company cannot be fastened with the liability and therefore respondent No.3 is excluded from the liability of payment which has given rise to the present appeal at the instance of the original claimants.

4. Mr. L.M. Chhablani, learned advocate for the appellants, contended that the learned Tribunal has excluded the Insurance Company by relying upon the judgment of the Supreme Court in the case of Mallawwa and others v. Oriental Insurance Co. Ltd. and others, 1999 ACJ 1. In the said judgment the Supreme Court has not laid down the proposition of law with respect to the liability of the insurance company for the goods vehicle in relation to the accident which has taken place under the Amended Act of 1994 which has come into force with effect from November 14, 1994. The Supreme Court has decided the liability of the insurance company with respect to goods vehicle as it stood then under Section 95 of the 1939 Act and, therefore, the Tribunal has wrongly placed reliance on the said judgment which has resulted into miscarriage of justice. He has also placed reliance on the judgment of the Supreme Court in the case of New India Assurance Company v. Satpal Singh, AIR 2000 SC 235 to canvass the proposition that the ratio laid down by the Supreme Court in Mallawwa's case (supra) is applicable to the Old Act and since the Old Act is amended twice, first vide Act No.59 of 1988 and second time vide Act No.54 of 1994 and in view of the provisions of clause (i) (b) of sub-section 2 of Section 147 of 1994 Act, the Insurance Company is liable to indemnify the owner even if the person was travelling in the Goods Vehicle if he was the owner of the goods or an authorized representative carried in the vehicle. He therefore urged that the appeal may be allowed and the order excluding the insurance company from the liability of payment may be quashed and set aside by fastening the liability upon the insurance company jointly and severally with the driver and owner of the vehicle and order may be modified accordingly.

5. Though respondent Nos.1 and 2 are served, none remained present. Mr. Shalin Mehta, learned advocate for respondent No.3 The Oriental Insurance Company Limited has supported the order which is impugned under the appeal. He contended that by virtue of Section 149

of the Act, insurance company cannot be fastened with the liability to pay compensation with respect to the order passed under Section 140 of the Act. He, therefore, asserted that the order passed by the Tribunal is correct as no illegality is committed by the Tribunal and since the petition filed under Section 166 of the Act is still pending and the order passed under Section 140 of the Act is at interlocutory stage, this Court would be loath to interfere with the impugned award. He therefore urged to dismiss the appeal.

6. I have considered the submissions advanced by the learned advocates appearing for the parties. i have perused the averments made in the memo of appeal, grounds set out therein, the impugned order which has given rise to the present appeal, relevant provisions of law contained in the Act of 1994 and the judgments cited at the bar.

7. At the outset it may be appreciated that there is no dispute with regard to the accident that has taken place on July 28, 1997 wherein the truck bearing No. GJ-9-V-956 driven by its driver respondent No.1 and owned by respondent No.2 is involved. Deceased Babulal boarded the said truck with his goods, sheep and goats, from Modasa and was going to Mumbai for selling them at Mumbai. Therefore, admittedly the said vehicle is a "Goods Vehicle". On having perusal of the FIR and Panchnama, the said truck turned turtle and therefore the accident has taken place. Therefore, the Tribunal has very rightly held by relying upon the FIR and panchnama that the driver of the truck was rash and negligent while driving the vehicle at the relevant point of time which has resulted into accident and ultimately the said accident has claimed the life of Babulal, son of the claimants who was travelling with his sheep and goats from Modasa for selling them at Mumbai.

8. Appellants/claimants being the heirs and legal representatives of deceased Babulal have filed claim petition under Section 166 of the Act for recovering compensation of Rs.3,50,000/- as they lost their breadwinner in the said accident. In the said petition claimants have filed application Ex.5 under the provisions of Section 140 of the Act for recovery of interim compensation of Rs.50,000/- under No Fault Liability principle.

9. So far as application under Section 140 of the Act is concerned, it is in the nature of interim compensation and as per the requirement of the said

provision, claimants need not prove negligence on the part of the driver concerned and only factum of accident is to be established and, therefore, requirement of Rule 231 of the Gujarat Motor Vehicles Rules are to be complied with and the Tribunal has to conduct the said application by way of summary proceeding and to determine the compensation under the said provisions the Tribunal has to rely upon the FIR, injury certificate resulted into permanent disablement in the injury case or autopsy report in case of death and policy of the insurance. If the above mentioned documents are provided by the claimants the claimants are entitled to receive compensation under Section 140 of the Act from the driver, owner and insurance company jointly and severally upon proof of the said documents. The Tribunal on appreciation and evaluation of the FIR, Panchnama of the scene of occurrence, inquest panchnama, autopsy report, RC Book and cover note of the insurance policy has rightly come to the conclusion that the accident was the result of the rash and negligent driving on the part of the driver of the truck and he was primarily liable. The Tribunal has also held that respondent No.2 being owner of the vehicle is liable under the principle of vicarious liability and, therefore, the Tribunal has held that both of them are jointly and severally liable to pay compensation. So far as the insurance company is concerned, the Tribunal has excluded it from liability of payment of compensation by placing reliance upon the judgment in Mallawwa's case (supra). It may be appreciated that so far as Mallawwa's case is concerned, the appeals were filed before the Supreme Court with respect to the accidents which had taken place between 1971 to 1985 and therefore obviously at the relevant time the Supreme Court had considered the position of law as it stood under section 95 of 1939 Act, meaning thereby, prior to the Amended Act of 1988 and 1994. Therefore, judgment in Mallawwa's case (supra) cannot be made a basis for deciding this case as in this case the accident has taken place on July 28, 1997, that is, after coming into operation of the Act of 1994. Therefore, I am of the opinion that Mallawwa's case has been wrongly relied upon by the Tribunal.

10. I am fortified in my view by the judgment of the Supreme Court in New India Assurance Company's case (supra) wherein the Supreme Court has clarified that the ratio laid down in Mallawwa's case (supra) is applicable to the Old Act and not to the New Act and held that under the new Act the Insurance policy covering third party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or

class and hence the decisions rendered under the old Act vis-a-vis gratuitous passengers are of no avail while considering the liability of the insurance company in respect of any accident which occurred or would occur after the new Act came into force.

11. In view of the discussion made in the para supra, I am of the opinion that the order under appeal excluding the insurance company from the liability of payment of compensation cannot be sustained and is required to be quashed and set aside by allowing this appeal and thereby including the insurance company in the liability of payment of compensation and therefore the impugned order is required to be modified to the aforesaid extent by allowing the appeal and holding that the appellants are entitled to recover the amount of compensation of Rs.50,000/- together with interest at the rate of 12% per annum from the date of the application till realisation from all the opponents jointly and severally including respondent No.3 insurance company.

12. It may be clarified that the amount awarded under the principle of No Fault Liability under Section 140 of the Act is an interim compensation and is subject to adjustment against the final award that will be passed in the MACP No.1394 of 1997 which is still pending before the Tribunal. This principle is established by the Supreme Court in the case of the Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala, 2001 (4) JT 477. Therefore, with a view to safeguard the interest of respondent No.3 insurance company, undertaking of the original claimants is required to be obtained so that the original claimants shall not abandon the main claim petition and withdraw the amount unconditionally with a view to fritter away the amount of compensation of Rs.50,000/- and interest thereon.

13. In view of this, it is directed that the original claimants shall file a solemn undertaking before the Tribunal within a period of four weeks hereof to the effect that the main claim petition shall not be abandoned, shall not be withdrawn and shall not be permitted to be dismissed for default or for any other cause and that the claimants shall obtain a decision on merits in the said claim petition. The amount awarded under the impugned order which is modified by fastening liability on the insurance company also shall be adjusted against the final award in the main claim petition. On the aforesaid undertaking being filed by the claimants, the amount under the impugned order may be permitted to be withdrawn by the original claimants on furnishing

security to the satisfaction of the Tribunal.

14. Seen in the above context, the impugned order under appeal excluding the insurance company from the liability of payment is liable to be quashed and set aside and the order is required to be modified by including the insurance company for the payment of compensation by allowing the appeal.

15. For the foregoing reasons, appeal succeeds and accordingly it is allowed with no order as to cost. Impugned order under appeal is quashed and set aside and it is modified making respondent No.3 also liable for payment of compensation to the claimants and therefore it is held that respondent No.3 is also held liable to pay compensation of Rs.50,000/- with interest and cost as awarded by the Tribunal jointly and severally with respondent Nos.1 and 2. Respondent No.3 shall deposit the aforesaid amount with the Tribunal within a period of four weeks hereof and on the amount being deposited it would be open for the Tribunal to pass appropriate order with respect to apportionment and disbursement on furnishing solvent security by the appellants/claimants to the satisfaction of the Tribunal.

(A. M. Kapadia, J.)